Supreme Court, U.S.
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No. 91-647

In The

Supreme Court of the United States

October Term, 1991

TRAVIS H. ASKEW and NOLA ASKEW,
d/b/a T & T PRODUCTION COMPANY,

Petitioners,

v.

H.E. CHILES, ROBERT WILDER,
SAM MARROW and STEPHEN P. BEATTY,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

VERNON N. REASER, JR.
REASER & WALL
1501 Mockingbird,
Suite One
Victoria, Texas 77904
(512) 576-6161

JAMES CLINTON GARLAND,
Of Counsel
FRASIER & FRASIER
1700 S.W. Boulevard
Tulsa, Oklahoma 74107
(918) 584-4724

MARK B. HUTTON
DONALD A. MCKINNEY
MICHAUD, HUTTON & BRADSHAW
P.O. Box 782110
Wichita, Kansas 67278
(316) 686-3404

Counsel for Petitioners

October 16, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The Court should grant Certiorari because the judgment below requires Petitioners to allege that Respondents individually used the mail and wire services in furtherance of their scheme to defraud; contravening the basic elements of mail and wire fraud as predicate acts for a racketeering cause of action.

2. The Court should grant Certiorari because the judgment below conflicts with the opinion of the Court of Appeals in *New England Data Services, Inc. v. Becher,* 829 F.2d 286 (1st Cir. 1987) and *Saporito v. Combustion Engineering, Inc.,* 843 F.2d 666 (3rd Cir. 1988); as well as the fundamental policies underlying the statutes violated by requiring Petitioners to allege detailed facts of Respondents' racketeering activity beyond what is necessary to give Respondents sufficient notice to answer and defend against the charges made.

RULE 29.1 STATEMENT

Petitioners, Travis H. Askew and Nola Askew, d/b/a T & T Production Company, are oil and gas operators doing business in Victoria County, State of Texas.

The Western Company of North America is a Delaware corporation that maintains offices and does business in Victoria County, State of Texas. The Western Company of Northern America is the sole owner of Western Petroleum Services, Inc.

Respondent H.E. Chiles is the founder and dominant stockholder of the Western Company of North America. Respondent Chiles is presently chairman of the board of the Western Company of North America. Respondent Robert E. Wilder is the president of Western Petroleum Services, Inc. Respondent Sam. R. Morrow is the vice-president and chief financial officer of the Western Company of North America. Respondent Steven P. Beatty is the controller of the Western Company of North America.

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No. _____

In The

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Travis H. Askew and Nola Askew, d/b/a T & T Production Company, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered in this case on July 18, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is reprinted as Appendix "A" to this Petition. The

opinion of the District Court is not reported and is reprinted as Appendix "B" to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 18, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review that judgment by Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq.; the Mail Fraud Statute, 18 U.S.C. § 1341; the Wire Fraud Statute, 18 U.S.C. § 1343; and Fed. R. Civ. P. 8 and 9. The relevant portions of these statutes and rules are submitted herewith as Appendix "C".

STATEMENT OF THE CASE

1. Statement of Facts.

Petitioners are oil and gas operators whose principal occupation is exploration for, development of and production of oil and gas. On or about the 7th of September, 1985, Petitioners began drilling a well in Brazos County, State of Texas, known as Smith Well No. 2. On or about the 19th of September, 1985, the well reached the total depth sought, penetrating the Georgetown formation. An

evaluation of the well indicated that it would be productive and a decision was made to place the well into production.

On or about the 20th of September, 1985, Petitioners contacted Respondents' corporation and enterprise, the Western Company of North America [hereinafter "Western"], to provide cementing services to complete the well. Western prepared a recommendation which Western represented as complying with the requirements for this particular well and the regulations of the Texas Department of Water Resources and the Texas Railroad Commission for proper cementing. The negotiations and final recommendation were delivered to Petitioners and the appropriate state agencies by United States Mail and telephonic conversations. Petitioners, in reliance upon Western's proposal and reputation in the industry, accepted the recommendation.

On or about June 15, 1986, Western's personnel, equipment and materials arrived at Smith Well No. 2 and began preparations to cement the casing in the well. During the course of cementing the well, Western shorted the amounts and/or specific ingredients required to properly cement the well and/or substituted all or part of the called for cement slurries with "junk cement". This junk cement damaged the well bore causing Smith Well No. 2 to fail in the production of oil and/or gas. Smith Well No. 2 was abandoned with substantial financial loss to Petitioners.

2. Petitioners' Cause of Action.

Petitioners were unaware of Western's use of junk cement in well casings until September 1986 when an

article detailing Western's practice of cheating customers by using junk cement was published in a Houston newspaper article. Further investigation revealed that Western, owned and controlled by Respondents herein, engaged in a systematic nationwide scheme to defraud by substituting junk cement for the specific slurries required in cementing well casing. Western pled guilty to a violation of the Tex. Penal Code Ann. § 7.21, for selling:

> An adulterated commodity to-wit: Cement ordered . . . for use in a well . . . , said cement not being of the type ordered having been blended with cement returned from other jobs and being of an unknown type due to its continual blending with various types and amounts of returned materials.[1]

Western was fined $5,000.00 for delivering this adulterated cement to twenty-one wells in the area.[2]

Smith Well No. 2 was just one of many damaged by Respondent's junk cement scheme carried out through their enterprise, the Western Company of North America. Respondents conducted this enterprise through a nationwide pattern of racketeering during a seventeen-year period. Namely, Respondents placed or caused to be placed in the mail or through wire communications, documents and other information representing that the cement for well casings met prescribed standards when in fact, the required cement was substituted for junk

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[1] *State of Texas v. Western Company of North America*, No. 1-47,401 (Victoria Co., Tex. Mar. 11, 1987) (Stipulation of Evidence).

[2] *Id.* (Sentence and Judgment).

cement. Respondents profited from this enterprise due to the savings achieved by substituting the more expensive slurries with cheaper junk cements.

Petitioners seek redress for their injuries caused by this scheme under the Racketeer Influenced Corrupt Organizations Act.[3] Petitioners have alleged that Respondents have engaged in a pattern of racketeering activity, as officers and directors of the enterprise, Western, by systematically conducting business through a pattern of mail and wire fraud.[4] Petitioners were injured by Respondents fraudulent activities and racketeering behavior.

3. Proceedings Below.

Petitioners initially filed this action in the District Court of Brazos County, State of Texas. Respondents removed the original petition from the County Court of Law to the United States District Court for the Southern District of Texas. Thereafter, Respondents filed a motion to dismiss for failure to state a claim upon which relief can be granted. The District Court dismissed Petitioners' original complaint.[5] Petitioners perfected an appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the lower court.[6] The Fifth Circuit held that when pleading mail

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[3] 18 U.S.C. § 1961 et seq.

[4] 18 U.S.C. §§ 1341, 1343.

[5] *Askew v. Chiles*, No. H-90-3003, slip op. (S.D.Tex. Dec. 19, 1990); *see attached*, Exhibit "B".

[6] *Askew v. Chiles*, No. 91-2119, slip op. (5th Cir. 1991); *see attached*, Exhibit "A".

and wire fraud as predicate acts in a RICO action, Fed. R. Civ. P. 9(b), requires that a plaintiff plead the *time, place and manner of each misrepresentation* made by *each, individual defendant* to plaintiffs.[7] Because this decision conflicts with the decisions of this Court, other circuit courts and well-established policies underlying the statutory provisions involved, Petitioners have sought Certiorari.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW REQUIRES PETITIONERS TO ALLEGE THAT RESPONDENTS INDIVIDUALLY USED MAIL AND WIRE SERVICES IN FURTHERANCE OF THE SCHEME TO DEFRAUD; CONTRAVENING THE BASIC ELEMENTS OF MAIL AND WIRE FRAUD AS PREDICATE ACTS FOR A RACKETEERING CAUSE OF ACTION.

The Fifth Circuit, in affirming the decision to dismiss Petitioners' original complaint, held that "[n]owhere in their original complaint or their briefs on appeal, did the plaintiffs point to an *specific* phone call or *particular* letter made or sent by any of the *defendants* in connection with the alleged fraud."[8] The Fifth Circuit affirmed the dismissal because Petitioners had failed to allege that an individual defendant made a specific phone call or placed a letter in the mail to allege mail and wire fraud as a predicate act for a RICO action. The Fifth Circuit's

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[7] *Id.*, slip op. at 4.

[8] *Id.* (emphasis added).

unprecedented standard not only conflicts with the basic principals for initial pleadings, but also with the prima facie elements of an action for mail or wire fraud as declared by this Court and other circuits.

There are two elements to the offense of mail fraud. These are (1) a scheme to defraud, and (2) the mailing of a letter with the purpose of executing the scheme.[9] Petitioners have alleged a nationwide scheme to defraud by Respondents in substituting "junk cement" for specified cement slurries required for proper cementing of oil and gas well casings. Furthermore, Petitioners have alleged that Respondents used or caused others to use the mail and wire services in carrying out their scheme to defraud. In support of this allegation, Petitioners attached numerous documents sent by mail clearly demonstrating the fraudulent nature of Respondents' scheme as well as the method in which it was carried out.

The Fifth Circuit, however, has interjected another element into the prima facie case: a requirement that Petitioners allege that individual Respondents sent a specific letter or made a particular phone call to petitioners in furtherance of the scheme to defraud. This Court and other Circuit Courts have clearly held that it is not necessary that an individual defendant actually mailed anything to establish a violation of the mail fraud statute. It is sufficient if a defendant caused the mail to be used or does an act with knowledge that the use of the

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[9] 18 U.S.C. §§ 1341, 1343; *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982); *United States v. Alston*, 609 F.2d 521, 536 (D.C. Cir. 1979).

mails will follow in the ordinary course of business or that it can be reasonably foreseen.[10]

Clearly the decision of the Fifth Circuit conflicts with basic, well-established principles underlying mail and wire fraud actions. The decision of the Fifth Circuit represents more than a conflict between that Circuit and other Courts, but as contravention of well-established federal law. Therefore, this Court should grant certiorari to review the judgment.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW CONFLICTS WITH THE OPINION OF THE COURT OF APPEALS IN *NEW ENGLAND DATA SERVICES, INC. V. BECHER*, 829 F.2d 286 (1st Cir. 1987) AND *SAPORITO V. COMBUSTION ENGINEERING, INC.*, 843 F.2d 666 (3rd Cir. 1988); AS WELL AS THE FUNDAMENTAL POLICIES UNDERLYING THE STATUTES VIOLATED BY REQUIRING PETITIONERS TO ALLEGE DETAILED FACTS OF RESPONDENTS' RACKETEERING ACTIVITY BEYOND WHAT IS NECESSARY TO GIVE RESPONDENTS SUFFICIENT NOTICE TO ANSWER AND DEFEND AGAINST THE CHARGES MADE.

The Fifth Circuit stated that Fed. R. Civ. P. 9(b) requires that a plaintiff allege the time, place and contents of an alleged fraudulent misrepresentation as well

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[10] *Pereira v. U.S.*, 347 U.S. at 8-9; *United States v. Keane*, 522 F.2d 534, 551 (7th Cir. 1975); *United States v. Craig*, 573 F.2d 454, 483 (7th Cir. 1977); *United States v. Lebovitz*, 669 F.2d 894, 897 (3rd Cir.), *cert. denied*, 102 S.Ct. 1979 (1982); *United States v. Beecroft*, 608 F.2d at 757.

as the identity of the person making them.[11] Thus, the Court of Appeals held that Petitioners had failed to meet this standard because Petitioners had failed to identify a specific phone call or particular letter made or sent by any of the defendants in connection with the alleged fraud.[12]

In essence the Fifth Circuit required Petitioners to plead with exacting particularity by (1) identifying a specific phone call or particular letter (2) sent by one of the defendants (3) in connection with the alleged fraud. Petitioners contend that such a stringent requirement of proof at the initial stages of pleading conflicts not only with the decisions in other circuits but with the fundamental policies underlying the pleading requirements of the Federal Rules of Civil Procedure.

In *New England Data Services v. Becher,*[13] the First Circuit Court of Appeals confronted the very issue in the instant case. The First Circuit reaffirmed that Rule 9(b) requires specificity in pleading mail and wire fraud as predicate acts of racketeering for a RICO action.[14] The Court restated the general purposes of Rule 9(b)'s particularity requirement: "(1) to place the defendants on notice and enable them to prepare meaningful responses; (2) to preclude the use of a groundless fraud claim as a pretext to discover a wrong or as a 'strike suit';

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[11] *Askew,* slip op. at 4 (5th Cir.) *quoting, Keith v. Stoelting, Inc.,* 915 F.2d 996, 1000 (5th Cir. 1990).

[12] *Askew,* slip op. at 4 (5th Cir.).

[13] 829 F.2d 286 (1st Cir. 1987).

[14] *Id.* at 290.

and (3) to safeguard defendants from frivolous charges which might damage their reputation."[15]

However, the court went further noting the "apparent difficulties in specifically pleading mail and wire fraud as predicate acts."[16] In particular the court stated:

> Where there are multiple defendants, as here, and where the plaintiff was not directly involved in the alleged transaction, the burden on the plaintiff to know exactly when the defendants called each other or corresponded with each, and the contents thereof, is not realistic.[17]

In order to alleviate these difficulties, the First Circuit held that "dismissal should not be *automatic* once the lower court determines that Rule 9(b) was not satisfied."[18]

Instead, "in an appropriate case, where, for example the specific allegations of the plaintiff make it likely that the defendant used interstate mail or telecommunications facilities, and the specific information as to use is likely in the exclusive control of the defendant, the court should make a *second* determination as to whether the claim as presented once the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint."[19]

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[15] *Id.* at 289.

[16] *Id.* at 290.

[17] *Id.* at 291.

[18] *Id.* at 290 (emphasis in original).

[19] *Id.* (emphasis in original).

The First Circuit reasoned that in a RICO action, as compared with a general fraud securities case, the facts constituting the fraud would be peculiarly within the defendants' control.[20] Therefore, "discovery is warranted to a greater extent in mail and wire fraud."[21]

The Court of Appeals for the Third Circuit noting the division between the circuits on this issue, endorsed the standard established by the First Circuit in the *New England Data Services* case.[22] In particular, the Third Circuit noted that focusing exclusively on the Rule 9(b) particularity language, "is too narrow an approach and fails to take into account the general simplicity and flexibility contemplated by the Rules."[23]

"All pleadings shall be so construed as to do substantial justice."[24] This Court has established the standard and the proper role of pleadings under the Federal Rules of Civil Procedure.

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he basis his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and

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[20] *Id.* at 291.

[21] *Id.*

[22] *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 674, 675-76 (3rd Cir. 1988).

[23] *Id.* at 674, *quoting, Seville Ind. Machinery v. Southmost Machinery*, 742 F.2d 786, 791 (3rd Cir. 1984); *Christidis v. First Penn. Mortgage Trust*, 717 F.2d 96, 100 (3rd Cir. 1983).

[24] Fed. R. Civ. P. 8(f).

> the grounds upon which it rests. . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . .The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[25]

Petitioners have alleged a nationwide scheme to defraud by Respondents. In support of the allegations, Petitioners have attached exhibits to their original petition to demonstrate the operations and workings of the scheme to provide junk cement to oil and gas operators. In further support, Petitioners provided the Court with Respondents' enterprise's criminal convictions for the scheme to defraud. Petitioners have provided all information and facts at their disposal. The remaining information is under the control of Respondents. Further discovery will provide the specific details required to prove this case.

The constrictive decision of the Fifth Circuit clearly conflicts with well-established pleading mandates of the Federal Rules of Civil Procedure and represents a departure from standards established by decisions of

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[25] *Conley v. Gibson*, 355 U.S. 41, 47-8 (1957).

this and other federal courts regarding the proper role of Rule 9(b) and RICO.[26] Therefore, this Court should grant Certiorari to review that judgment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

VERNON N. REASER, JR.
REASER & WALL
1501 Mockingbird, Suite One
Victoria, Texas 77904
(512) 576-6161

JAMES CLINTON GARLAND
Of Counsel
FRASIER & FRASIER
1700 S.W. Boulevard
Tulsa, Oklahoma 74107
(918) 584-4724

MARK B. HUTTON
DONALD A. MCKINNEY
MICHAUD, HUTTON
& BRADSHAW
P.O. Box 782110
Wichita, Kansas 67278
(316) 686-3404

Counsel for Petitioners

October 16, 1991

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[26] *See, Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498-500 (1985) (noting the liberal application and broad reach of RICO civil actions).

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2119
Summary Calendar

TRAVIS H. ASKEW and NOLA ASKEW,
d/b/a T & T PRODUCTION CO.,
Plaintiffs-Appellants,

versus

H.E.CHILES, ROBERT WILDER,
SAM MORROW, and STEVEN P. BEATTY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-3003)

(July 18, 1991)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the Rule, the court has determined that this opinion should not be published.

The plaintiffs, oil and gas operators, brought this claim against the defendants, officers and former officers of Western Company of North America, seeking damages for alleged violations of the Racketeer Influenced and Corrupt Organizations statute ("RICO") and for fraud. Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6), which was granted by the district court. Finding no error, we AFFIRM.

FACTS AND PROCEDURAL HISTORY

The plaintiffs are oil and gas operators whose principal business includes exploration and development of oil and gas wells. In September of 1985, they began drilling a well, which became known as the Smith Well No. 2 in Brazos County, Texas. Western Company of North America ("Western"), a company that mixes and sells cement used in oil and gas wells, was invited to bid on the Smith well project and was ultimately awarded the contract for the job. The plaintiffs allege that Western supplied them with a substandard mix of cement as part of an ongoing scheme intended to defraud customers. The plaintiffs charge that the use of the substandard cement resulted in the well producing less income than would otherwise have been produced.

The plaintiffs originally filed a proof of claim against Western as part of Western's voluntary proceeding in Chapter 11 of the Bankruptcy Act but that claim was denied. The plaintiffs then filed a petition in state court seeking damages for alleged violations of section 1962 of the RICO statute and for fraudulent concealment against

H.E. Chiles, Robert Wilder, Sam Morrow and Steven Beatty, officers and former officers of Western.

The Defendants timely removed the case to the United States District Court for the Southern District of Texas where they filed a motion to dismiss for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12 (b)(6). The district court granted the motion and plaintiffs have timely appealed. We now consider each of the claims made by plaintiffs.

DISCUSSION

I. Standard of Review.

Our review of a district court's grant of a Federal Rule of Procedure 12 (b)(6) motion is de novo. *See Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 276 (5th Cir. 1990). We will not affirm the dismissal unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim. "This is a rigorous standard, but subsumed within it is the requirement that the plaintiff state her case with enough clarity to enable a court or opposing party to determine whether or not a claim is alleged." *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). The plaintiffs have failed to state their case with the requisite clarity.

II. RICO, 18 U.S.C. § 1962 (c).

Section 1962 (c) of the RICO statute, makes it

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

A violation of § 1962 (c) " 'requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' " *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985)). In order to establish a pattern of racketeering activity, the plaintiffs must allege facts that would support a claim that the officers of Western committed two or more acts of racketeering. *See* 18 U.S.C.A. § 1961 (5) (West 1984). In this case, the plaintiffs allege that the officers of Western committed mail fraud, wire fraud and obstruction of justice.

To support a claim for mail or wire fraud, a plaintiff must state the circumstances constituting fraud "with particularity." Fed. R. Civ. P. 9 (b). "At a minimum, this requires that the plaintiff allege the time, place and contents of the alleged misrepresentation, as well as the identity of the person making them." *Keith v. Stoelting, Inc.*, 915 F.2d 996, 1000 (5th Cir. 1990). The plaintiffs fail to meet these minimum requirements. Nowhere in their original complaint or their briefs on appeal, do the plaintiffs point to a specific phone call or particular letter made or sent by any of the defendants in connection with the alleged fraud. Instead, plaintiffs attached several exhibits to their original petition, by which they purport to demonstrate a fraud by defendants. However, none of the documents refer to the Smith Well No. 2 in Brazos County, Texas upon which the plaintiffs' suit is based,

and none of the exhibits demonstrates knowledge of the alleged fraud by any of the defendants.

The plaintiffs further allege that the defendants obstructed justice by shredding documents and intimidating witnesses. Again, plaintiffs fail to allege any facts that would support such charges. As with the plaintiffs' allegations concerning mail and wire fraud, these accusations are nothing more than conclusional allegations. The plaintiffs cite no facts that would tend to support their claim that defendants have obstructed justice.[1]

The allegations made by the plaintiffs are insufficient to state a cause of action upon which relief can be granted. Therefore, the district court did not err in dismissing the plaintiffs' claim alleging a violation of section 1962 (c) of the RICO statute.

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[1] The plaintiffs' Original Petition simply states as follows:

> 77. Plaintiff futher [sic] alleges that the Defendants have attempted to remove records from its offices and has apparently rewritten or doctored computer programs and records and shredded records for the purpose of concealing its scheme.
>
> 78. The Defendants has [sic] attempted to silence witnesses and to otherwise make unavailable evidence necessary for Plaintiff to prove its claims for relief.

Plaintiffs' Original Petition at 24-25.

III. RICO, 18 U.S.C. § 1962 (a) and (b).

We next consider the plaintiffs' claim that the defendants violated sections 1962 (a) and (b) of the RICO statute. In relevant part, those sections state as follows:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Since the plaintiffs failed to allege any facts that would support a claim that the officers of Western committed two or more acts of racketeering activity, we find that these claims must also fail.[2]

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[2] Although the district court did not specifically address these two claims in its memorandum opinion, it was clear that its judgment meant to dispose of all live issues before it. *Compare Armstrong v. Trico Marine, Inc.*, 923 F.2d. 55, 58 (5th Cir. 1991) ("When the district court 'hand[s] down a judgment couched in language calculated to conclude all claims before him,' that judgment is final.") (citation omitted). When the judgment of a district court is correct, we may affirm that judgment for reasons not advanced by it. *See Laird v. Shell Oil Co.*, 770 F.2d 508, 511 (5th Cir. 1985).

IV. RICO, 18 U.S.C. § 1962 (d).

Section 1962 (d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [section 1962]." In order to support their allegation of conspiracy, the plaintiffs must present facts that would tend to show that defendants "manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*" *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978) (emphasis in original). The plaintiffs' allegations of conspiracy fail to present such facts. Instead, plaintiffs again rely on conclusional and vague allegations of conspiracy.[3] Such general allegations of conspiracy are insufficient to establish a cause of action. *See Dayse v. Schuldt*, 894 F.2d 170, 173 (5th Cir. 1990);

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[3] Plaintiffs' Original Petition states as follows:

> 85. The Defendants named in this complaint conspired with others unnamed, [sic] Defendants within this complaint conspired and agreed to participate, directly or indirectly, in a scheme and conspiracy to affect a fraud upon the Plaintiff and others violating 18 U.S.C. Section 1961-1968.
>
> 86. The named Defendants agreed and participated in, directly or indirectly, acts in the furtherance of this conspiracy which affected a fraud upon the Plaintiffs and others and such acts involved oral and written transmissions . . . . The Defendant [sic] objectively manifested this agreement to participate in the conspiracy to achieve enterprise objectives through the commission of multiple acts of mail and wire fraud as recited above.

Plaintiffs' Original Petition at 27-28.

Arsenaux v. Roberts, 726 F.2d 1022, 1023-24 (5th Cir. 1982); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980); 5 C. Wright, A. Miller, *Federal Practice and Procedure* § 1233 at 255-56 (2d ed. 1990). The district court did not err in dismissing the plaintiffs' conspiracy claim.

V. Fraudulent Concealment.

In order to state a cause of action for fraud under Texas law, a plaintiff must allege sufficient facts to show:

(1) that a material representation was made;

(2) that it was false;

(3) that when the speaker made it he knew that it was false or made it recklessly without any knowledge of the truth and as a positive assertion;

(4) that he made it with the intention that it should be acted on by the party;

(5) that the party acted in reliance upon it;

(6) that he thereby suffered injury.

Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977). Where a plaintiff's fraud allegation concerns a failure to disclose information, as in this case, the plaintiff is additionally required to plead facts that demonstrate that the defendants had an affirmative duty to reveal such information. *See Southwest E & T Suppliers, Inc. v. American Enka Corp.*, 463 F.2d 1165, 1166 (5th Cir. 1972) ("Texas law is clear that if there is no confidential or fiduciary relation between the parties, mere silence does not amount to fraud or misrepresentation."); *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 669

(Tex. Ct. App. – Dallas 1986, writ ref'd n.r.e.) ("A failure to disclose information is not fraudulent unless one has an affirmative duty to disclose, such as where a confidential or fiduciary relationship exists between the parties or where a party later learns that the previous affirmative representations are in fact false.") (citations omitted).

We agree with the district court that the plaintiffs have failed to allege sufficient facts to establish the elements required to state a cause of action for fraudulent concealment. The plaintiffs have stated no set of facts that would tend to support a finding that any of the defendants made a false representation with the intention that it be acted on by the plaintiffs; and the plaintiffs have also failed to present any facts that would tend to demonstrate that the defendants owed plaintiffs an affirmative duty to disclose information.

The district court's order to dismiss is AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRAVIS H. ASKEW, et al., Plaintiffs,	§	CIVIL ACTION NO. H-90-3003
v.	§	
H. E. CHILES, et al.,	§	(Filed Dec. 19, 1990)
Defendants.	§	

FINAL JUDGMENT

This action is DISMISSED WITHOUT PREJUDICE.

This is a Final Judgment.

SIGNED at Houston, Texas, on this 18th day of December 1990.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT
JUDGE

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Plaintiffs,	§	CIVIL ACTION
	§	NO. H-90-3003
v.	§	
H. E. CHILES, et al.,	§	(Filed Dec. 19, 1990)
	§	
Defendants.	§	

MEMORANDUM AND ORDER

This action arises from the alleged unlawful business dealings and practices of defendants as officers of the Western Company of North America and its subsidiaries (hereinafter "Western"). Plaintiffs have sued defendants under the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. §§ 1961-1968, alleging that Defendants committed various acts of mail and wire fraud, obstructed justice, and conspired to violate RICO. Plaintiffs have also asserted State causes of action against defendants for fraudulent concealment. Before the Court is defendants' motion to dismiss plaintiffs' Complaint for failure to state a claim. The record reflects that Plaintiff has not filed a timely response to this motion. After careful consideration, the motion is GRANTED.

To avoid dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) it must be apparent to the Court that plaintiffs can prove no set of facts in support of their claim. While this is a rigorous standard, subsumed within it is the requirement that plaintiffs state their claims with sufficient clarity to enable a court or opposing party to

determine whether or not a valid claim is alleged. A plaintiff must plead specific facts, not mere conclusory allegations, to support each element of a RICO cause of action. *Elliot v. Foufas*, 867 F.2d 877 (5th Cir. 1989). In this case plaintiffs have asserted RICO causes of action against defendants under § 1962(c) and (d).

RICO, 18 U.S.C. § 1962(c) & (d) – Counts 1 & 2

Section 1964(c) provides a RICO plaintiff with a civil action to recover treble damages for injuries caused by violations of § 1962. To allege a violation of § 1962(c) plaintiffs must plead sufficient facts to show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Montesano v. Sea First Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987) (*quoting Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3279, 3285 (1985)). These are separate requirements. To establish the existence of an "association in fact" enterprise under § 1961(4) requires an ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure. *Atkinson v. Anardarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.), *cert. denied*, 107 S. Ct. 3276 (1987). A "pattern of racketeering activity" is defined as at least two predicate acts of racketeering activity (an indictable act under one or more specified laws, usually federal criminal provisions, including mail and wire fraud) that shows "continuity plus relationship" with a legitimate business. *Cowan v. Korley*, 814 F.2d 223, 226-27 (5th Cir. 1987).

An enterprise, however, "is not a 'pattern of racketeering activity,' but must be 'an entity separate and

apart from the pattern of activity in which it engages.' " *Montesano*, 818 F.2d at 427. The violators of § 1962(c) who commit the pattern of predicate racketeering acts must be distinct from the enterprise whose affairs are thereby conducted. *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986). A RICO plaintiff must also plead specific facts that establish an association that exists for some purpose other than merely committing the predicate acts that allegedly show a pattern. *Old Time Enterprises v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989). Finally, plaintiffs must plead sufficient facts to show a proximate causal relation between the RICO predicate act and plaintiffs' damages.

Proof of a racketeering conspiracy under 18 U.S.C. § 1962(d) requires the elements of a substantive racketeering count under § 1962(c), plus the additional element of an agreement among the parties to conduct racketeering activities. *United States v. Carlock*, 806 F.2d 535, 544 (5th Cir. 1986).

In this case plaintiffs have failed to plead sufficient facts to show the existence of a RICO enterprise under 18 U.S.C. § 1962(c). Plaintiffs' Complaint alleges a RICO "association in fact" enterprise among the defendants as officials of Western and its subsidiaries. In the alternative the complaint alleges that Western is a RICO enterprise. The complaint also alleges various fraudulent activities conducted by Western against plaintiffs. However, these pleadings fail to allege with sufficient particularity the requisite organizational characteristics of a RICO enterprise. Other than general vague and conclusory allegations that Western engaged in fraudulent conduct, there are no facts alleged to show how defendants were

involved in these alleged fraudulent activities. Plaintiffs have alleged no facts to show who exercised decision-making authority within the alleged enterprise or what alleged acts of fraud and obstruction of justice constituted participation by defendants in the operation of the RICO enterprise, if in fact one existed. Contrary to plaintiffs' argument, the mere fact that individuals might have joined together to allegedly defraud plaintiffs is insufficient to establish a claim under the RICO statute. *See Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989).

Furthermore, plaintiffs, complaint fails to allege with sufficient particularity facts that would show that the defendants participated in a pattern of racketeering activity. The alleged predicate RICO activities were mail and wire fraud and obstruction of justice. Allegations of fraud are examined under Fed. R. Civ. P. 9(b) for purposes of a 12(b)(c)(6) motion to dismiss. *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1427 (E.D.N.Y. 1988). Rule 9(b) provides that certain "special matters" such as fraud and mistake, must be pled with heightened particularity. RICO fraud allegations will survive a 9(b) challenge if the complaint contains factual allegations sufficient to plead the time, place and identities of the parties and the nature of the fraudulent activity. *Bosse v. Crowell, Collier & MacMillian*, 565 F.2d 602, 611 (9th Cir. 1977). In this case the complaint not only fails to plead any specific fraudulent act or misrepresentation by defendants, but it also fails to allege the time and place of such conduct. Furthermore, plaintiffs fail to plead and specific documents or communications that were sent through the mail or wires by the individual defendants as part of an alleged RICO enterprise. Under these circumstances the

Court concludes that plaintiffs' allegations are insufficient to apprise each defendant of their role in the alleged fraud. *See Zatkin v. Primuth*, 551 F. Supp. 39, 42 (S.D. Cal. 1982); *In re Equity Funding Corporation of America Securities Litigation*, 416 F. Supp. 161, 181 (C.D. Cal. 1976); *see also Bruns v. Ledbetter*, 583 F. Supp. 1050 (S.D. Cal. 1983).

Allegations of obstruction of justice under RICO are examined under Fed. R. Civ. P. 8(a) for purposes of a 12(b)(6) motion to dismiss. *See United States v. Bonanno*, 683 F. Supp. at 1427. Rule 8(a) requires that a complaint set forth a short, plain statement of the claim that will give the defendants fair notice of what plaintiffs' claims are and the bases of the claims. *Conley v. Gibson*, 78 S. Ct. 99, 101-102 (1957). After careful consideration and review of plaintiffs, complaint, the Court finds that plaintiffs have not pled with sufficient particularity any federal cause of action for obstruction of justice so that defendants and the Court can be placed on clear notice as to what has been alleged and the substance of plaintiffs' claims.

Finally, because plaintiffs have failed to allege sufficient facts to set forth the substantive elements of a RICO claim under § 1962(c), plaintiffs have failed to set forth a claim for a RICO conspiracy under 18 U.S.C. § 1962(d). *United States v. Carlock*, 806 F.2d at 537. Because the Court finds that plaintiffs have failed to allege sufficient facts to establish RICO causes of action under 18 U.S.C. § 1962(c) and (d), defendants' motion to dismiss plaintiffs' RICO claims is GRANTED.

Fraudulent Concealment – Count 3

Under Texas law to state a cause of action for fraud plaintiffs must allege sufficient facts to show:

(1) that a material representation was made,

(2) that it was false,

(3) that when the speaker made it he knew that it was false or made it recklessly without any knowledge of the truth and as a positive assertion,

(4) that he made it with the intention that it should be acted upon by the parties,

(5) that the party act in reliance upon it, and

(6) that he thereby suffered injury.

Stone v. Lawyer's Title Insurance Corp., 554 S.W.2d 183, 185 (Tex. 1977). Where the alleged fraud is a failure to disclose information or "fraudulent concealment," plaintiff must also show that defendants had an affirmative duty to disclose such information. *See Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App. – Dallas 1986, writ ref'd n.r.e.) ("A failure to disclose information is not fraudulent unless one has an affirmative duty to disclose, such as where a confidential or fiduciary relationship exists between the parties or where a party later learns that the previous affirmative representations are in fact false.") The Court finds that plaintiffs have alleged insufficient facts to establish the elements required to state a cause of action for fraudulent concealment. Plaintiffs have not pled that defendants had an affirmative duty to disclose anything to plaintiffs, or that plaintiffs relied on this failure to disclose or that plaintiffs

suffered any damage from the result of such reliance. Accordingly, the Court finds that plaintiffs have failed to allege a cause of action against defendants for fraudulent concealment, and defendants' motion to dismiss with respect to this cause of action is GRANTED.

SIGNED at Houston, Texas, on this 18th day of December 1990.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

THE FEDERAL RULES OF CIVIL PROCEDURE.

Fed. R. Civ. P. 8.

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs

as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

Fed. R. Civ. P. 9.

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative

averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty

and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987.)

THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT.

18 U.S.C. § 1961.

§ 1961. Definitions

As used in this chapter –

> **(1)** "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of

title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of

motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity,

one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(As amended Pub.L. 98-473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title XIII, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7020(c), 7032, 7054, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402; Pub.L. 101-73, Title IX, § 968, Aug. 9, 1989, 103 Stat. 506; Pub.L. 101-647, Title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927.)

18 U.S.C. § 1962.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(As amended Pub.L. 100-690, Title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)

The Mail Fraud Statute.

18 U.S.C. § 1341.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered

by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(i), 103 Stat. 500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2504(h), 104 Stat. 4861.)

The Wire Fraud Statute.

18 U.S.C. § 1343.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(j), 103 Stat. 500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2504(i), 104 Stat. 4861.)

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No. 91-647

IN THE

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OCTOBER TERM, 1991

TRAVIS H. ASKEW AND NOLA ASKEW,
d/b/a T & T PRODUCTION COMPANY,

Petitioners,

v.

H.E. CHILES, ROBERT WILDER,
SAM MORROW AND STEVEN P. BEATTY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

Catharina J.H.D. Haynes
Attorney of Record
Rod Phelan
Baker & Botts
800 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201-2916
(214) 953-6500

Counsel for Respondents

November 1991

QUESTIONS PRESENTED

1. Does the Fifth Circuit's opinion, fairly read, impose on plaintiffs who plead mail fraud a new requirement that they plead that an individual defendant was the one who actually mailed the alleged material?

2. Is any circuit so lax in its application of Rule 9(b) that it countenances wholly conclusory pleadings such as the one in this case upon which Petitioners chose to stand?

LIST OF PARTIES

Respondents do not dispute Petitioners' statement about themselves.

The Western Company of North America, a publicly held corporation, and its inactive, wholly owned subsidiary, Western Petroleum Services, Inc., are not parties to this case or this appeal.

Respondent H.E. Chiles is the founder but not a stockholder of The Western Company of North America. He has not been the Chairman of the Board of Directors of that company since May of 1990. Respondent Robert E. Wilder has never been the President of Western Petroleum Services, Inc. Respondent Sam Morrow is the Vice President and Chief Financial Officer of The Western Company of North America, and Respondent Steven P. Beatty is the Comptroller of The Western Company of North America.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

After their proof of claim against The Western Company of North America ("Western") was disallowed in Western's Chapter 11 reorganization proceedings, Petitioners sued Respondents, purporting to allege violations of the federal racketeering statutes and a state law cause of action of "fraudulent concealment." Prior to filing this action, Petitioners' wholly owned company, Enterprise Drilling and Manufacturing Company, Inc., represented by the same three firms of attorneys, had also sued Respondents, alleging virtually the same purported causes of action, together with other state law

claims.[1] In that case, Respondents also moved to dismiss; the district judge entered a RICO standing order specifying what must be pled to state a RICO claim.[2]

Thus, in filing this suit, Petitioners and their attorneys were fully aware of what is required to plead a RICO cause of action. Nevertheless, they sued these four men, officers and former officers of Western, on the irrelevant basis of *Western's* guilty plea in response to certain state misdemeanor counts relating to wells not at issue in this case. Extensive investigations made at the time of those allegations against Western never implicated *Respondents* in any wrongdoing. Petitioners *now*[3] make the astonishing suggestion in their petition for writ of certiorari that these four Respondents completely controlled the activities of Western, a publicly held corporation with thousands of employees.

Respondents moved to dismiss Petitioners' bare-bones pleading. Petitioners did not respond to the motion to dismiss, choosing instead to "stand on their pleadings." Appellants' Fifth Circuit Brief, p. 2. After a thorough review of Petitioners' pleading, the district court dismissed the case.

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[1] *Enterprise Drilling and Manufacturing Company, Inc. v. Western Petroleum Services, Incorporated, H.E. Chiles, Robert E. Wilder, Sam Morrow, and Steven P. Beatty;* In the United States District Court for the Southern District of Texas, Victoria Division; Case No. V-88-25.

[2] In spite of this standing order, Enterprise again filed a deficient complaint which is the subject of a pending motion to dismiss in the district court.

[3] They never alleged in their pleading, as they do in their petition for certiorari, that Western is "owned and controlled" by Respondents. It is not. They never alleged in their pleading, as they do in their petition for certiorari, that Respondents "placed or caused to be placed in the mail . . . documents representing that the cement for well casings met prescribed standards . . . " *See, e.g.*, paragraph 60 of the pleading set forth in the Addendum. Even now they state no facts to support these accusations.

Petitioners neither sought to amend their pleading nor suggested to that court that they should have been allowed to do so.

On appeal, Petitioners again made no claim that they should have been permitted to amend their pleading or take any further action whatever in the district court before the dismissal. Instead, they contended that their fact-deficient pleading *complied* with the standards set forth in Federal Rules 8(a) and 9(b). The Fifth Circuit disagreed and affirmed Judge Lake's dismissal. Now, for the first time, Petitioners imply that the district court should somehow have disregarded their own election to "stand on their pleadings" and should have compelled them to amend to add some unspecified, imaginary information.

REASONS FOR DENYING THE WRIT

The Fifth Circuit Panel Did Not Make New Law In Its Opinion In This Case. Petitioners build the foundation for their entire case for certiorari on one sentence in the Fifth Circuit's opinion.[4] When the opinion is examined as a whole, this foundation crumbles. The Fifth Circuit did not limit itself to deciding whether a specific phone call or a particular letter was alleged. Instead, the court examined Petitioners' pleading as a whole and found it lacking:

> [P]laintiffs attached several exhibits to their original petition, by which they purport to demonstrate a fraud by defendants. However, none of the documents refer to the Smith Well No. 2 in Brazos County, Texas upon which the plaintiffs' suit is based, and none of the exhibits demonstrates knowledge of the alleged fraud by any of the defendants.

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[4] "Nowhere in their original complaint or their briefs on appeal, do the plaintiffs point to a specific phone call or particular letter made or sent by any of the defendants in connection with the alleged fraud." *Askew v. Chiles*, No. 91-2119, slip op. at 4 (5th Cir. July 18, 1991).

> . . . [P]laintiffs' allegations concerning mail and wire fraud . . . are nothing more than conclusional allegations.

Askew v. Chiles, No. 91-2119, slip op. at 4-5 (5th Cir. July 18, 1991).

The Fifth Circuit properly found that Petitioners' vague and conclusory allegations failed to satisfy federal pleading requirements. No further analysis was necessary. Contrary to Petitioners' spurious contentions, the Fifth Circuit panel did not attempt or purport to make new law regarding mail and wire fraud in its unpublished opinion, handed down without oral argument.[5] *Cf. Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987) (one panel cannot overturn another, absent an intervening en banc or Supreme Court decision).

Any Imagined Split Among The Circuits Is Irrelevant To This Case. Petitioners also contend that there is a split among the circuits as to the application of Rule 9(b) to RICO actions. However, all the circuits which have considered this issue agree that Rule 9(b) applies to RICO pleadings where the

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[5] Under Fifth Circuit precedent, "[e]stablishing a mail fraud violation requires proof of three elements: (1) the defendant participated in some scheme or artifice to defraud, (2) the defendant or someone associated with the scheme used the mails or 'caused' the mails to be used, and (3) the use of the mails was for the purpose of executing the scheme." *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481-82 (5th Cir. 1986).

predicate acts alleged involve fraud.[6] At most, the different courts vary slightly in the strictness with which they apply the rule. None is so lax, however, as to countenance such a wholly conclusory pleading as that of Petitioners.[7]

Despite Rule 9(b)'s requirement of particularity, or even Rule 8(a)'s inherent requirement of fair notice, Petitioners

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[6] *See, e.g., O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991) ("Because plaintiffs premise these claims [including RICO], in large part, on defendants' alleged fraudulent conduct, plaintiffs must comply with Rule 9(b), . . . "); *Graue Mill Development Corp. v. Colonial Bank & Trust Co. of Chicago*, 927 F.2d 988, 992 (7th Cir. 1991) (requiring "RICO plaintiffs, like all other parties pleading fraud in federal court," to comply with Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) ("Rule 9(b) requires particularity in pleading RICO mail and wire fraud."); *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989) ("We further note that Elliott relies on alleged fraudulent conduct by the defendants as the basis for her RICO claim and that Fed.R.Civ.P. 9(b) requires fraud be pled with particularity."); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 168 (1989) (applying Rule 9(b) to a RICO claim based on mail and wire fraud); *New England Data Services, Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987) ("Rule 9(b) does *apply* to civil RICO claims."); *Blount Financial Services, Inc. v. Walter E. Heller & Co.*, 819 F.2d 151 (6th Cir. 1987) (applying Rule 9(b) to RICO mail fraud allegations); *Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1054 (8th Cir. 1985) ("[T]his [RICO] complaint falls far short of the specificity required by Fed.R.Civ.P. 9(b) when fraud is alleged.").

[7] *See, e.g., Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir. 1991) ("It is not enough for a plaintiff to file a RICO claim, chant the statutory mantra, and leave the identification of predicate acts to the time of trial."); *O'Brien*, 936 F.2d at 676 ("An ample factual basis must be supplied to support the charges."); *Graue Mill Development Corp.*, 927 F.2d at 992 (" 'Cryptic statements' suggesting fraud are not enough;"); *Alan Neuman Productions*, 862 F.2d at 1393 ("The allegations of Neuman's complaint concerning predicate acts of fraud are similarly general referring to 'many acts of mail fraud,' 'many acts of wire fraud,' and 'many victims,' "); *Flowers*, 775 F.2d at 1054 ("[A] defendant faced with allegations of criminal conduct is entitled to more clarity and specificity than was afforded in this rather vague complaint.").

have failed to plead any facts which would support a finding that any of the Respondents did anything to advance a fraudulent scheme involving mail or wire fraud. Instead, their pleading is a model of vague and convoluted allegations.[8]

"[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). While Petitioners provided extraordinary detail about how to drill an oil well and the importance of cement in that process, and while they gave a general description of the operations of Western, they said almost nothing about any individual Respondent's supposed wrongdoing. For example, paragraphs 9 through 67 of their original petition, portions of which are excerpted in the Addendum, do not even mention Respondents. The few times that Respondents are mentioned they are lumped together in broad, sweeping statements. The exhibits attached to their pleading have nothing to do with the well in this case and suggest nothing about these Respondents.

In their brief to the Fifth Circuit, Petitioners argued that paragraphs 26, 29, 38, 41, and 60[9] of their pleading provided the requisite factual allegations about the alleged "specific fraudulent acts" and the mailing of documents "in connection with the scheme." Appellants' Fifth Circuit Brief, p. 18. These paragraphs, quoted in the Addendum, do not implicate these Respondents in any fraudulent scheme. Like their statement of the case here, Petitioners' pleading targets Western,

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[8] Petitioners' fraud allegations are not the only deficiencies in their RICO pleading. They also provided no factual support for a finding of scienter, of active participation in the alleged scheme, or of causal nexus. Their enterprise allegations were confusing and conclusory as well.

[9] Exhibits A, D, H, I, J, K, and L, referenced in these paragraphs, dealt with the Staples No. 1 well in Victoria County, Texas, not with the Smith No. 2 well in Brazos County (some one hundred miles away) at issue here. None of these exhibits mention or implicate Respondents.

not a party to this proceeding. Their mail and wire fraud allegations (paragraphs 80 and 82, set out in the Addendum) simply parrot the applicable statutory elements and accuse Respondents of "repeated use of the mails." As such, Petitioners failed to provide the particularity or even the fair notice mandated by the federal rules. It is quite apparent from their pleading that, after losing against Western in bankruptcy court, their search for a deep pocket led them to sue these four men without a shred of factual support for implicating any of them in any fraudulent scheme.

Nor do Petitioners' two cases save the day for them. *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir. 1988), *vacated*, 489 U.S. 1049 (1989); *New England Data Services, Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987). In *Becher*, the court found that the complaint did *not* satisfy Rule 9(b). 829 F.2d at 292. The court agreed with the Fifth Circuit that "Rule 9 'requires specification of the time, place, and content of an alleged false representation, . . .' " *Id.* at 288 (quoting *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980)). The court found that the trial court should have enforced its own specific discovery orders and allowed the plaintiff to amend.

Unlike *Becher*, in our case there were no "specific allegations of the plaintiff." *See* 829 F.2d at 290. Petitioners pleaded *no* facts supporting a finding that the "specific information as to use is likely in the exclusive control of the defendant,"[10] the subject of so much discussion in *Becher*. *Id.* As the First Circuit itself has recently stated: "Although *Becher* may in certain circumstances give a plaintiff a second bite at the apple, its generous formulation is not automatically bestowed

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[10] Petitioners never made this claim in the district court. Indeed, contrary to their current claim that the information they need for their pleading is in the control of the Respondents, they boasted in their pleading that the exhibits that they attached came from the investigations of Western. *See* paragraph 56, quoted in the Addendum.

on every litigant." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 44 (1st Cir. 1991).

Furthermore, in the present case, both of the lower courts clearly took the view that they could not dismiss or affirm the dismissal unless it appeared beyond doubt that Petitioners could not prove any set of facts in support of their claim.[11] *See Conley v. Gibson*, 355 U.S. 41 (1957). Once this determination was made, the further determination suggested by *Becher* became redundant.[12] The case at bar is not one where form triumphed over substance. It is a case where the pleading simply had no substance. As such, no further analysis was necessary.

Similarly, *Saporito* concluded that the complaint did not satisfy Rule 9(b), but remanded to allow the plaintiff to amend. The Fifth Circuit has done the same, where appropriate. *Elliott v. Foufas*, 867 F.2d 877 (5th Cir. 1989) (remanding case where the district court should have interpreted plaintiff's offer to amend as a motion to amend and ruled upon same). Furthermore, *Saporito* was vacated by this Court, and the Third Circuit's subsequent decision is unreported. *Combustion Engineering, Inc. v. Saporito*, 489 U.S. 1049 (1989), *on remand*, 879 F.2d 859 (3d Cir. 1989) (decision without

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[11] The Fifth Circuit stated: "We will not affirm the dismissal unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim." *Askew v. Chiles*, No. 91-2119, slip op. at 3 (5th Cir. July 18, 1991). The district court followed the same standard: "[I]t must be apparent to the Court that plaintiffs can prove no set of facts in support of their claim." *Askew v. Chiles*, No. H-90-3003, slip op. at 2 (S.D. Tex. Dec. 19, 1990).

[12] The First Circuit held that if the "specific allegations" of the pleading make it likely that information as to the use of mails is in the exclusive control of the defendants, then the court should make a "*second* determination as to whether the claim as presented warrants the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint." 829 F.2d at 290 (emphasis in original).

published opinion). As such, it hardly presents a compelling case for the existence of a split among the circuits.

Most important, neither *Becher* nor *Saporito* apply in this case, where Petitioners admittedly "stood on their pleadings."[13] Appellants' Fifth Circuit Brief, p. 2. Petitioners did nothing in the district court. They neither responded to the motion to dismiss, amended, nor sought to amend their complaint. *See Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 43 (1st Cir. 1991) (plaintiff's inactivity in the district court set that case "well apart from *Becher*."). They neither raised *Becher* and *Saporito* in the Fifth Circuit, nor argued there that they should have been compelled by the trial court to amend. It is too late to do so now. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) (refusing to address a question not raised in the court of appeals); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

Resolution of any imagined split among the circuits would not affect the judgment in this case. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (writ of certiorari improvidently granted).[14] Under even the most lenient Rule 9(b) standard, this pleading wholly fails to pass muster. If Petitioners' pleading in this case can be said to satisfy Rule 9(b), then any pleading whatever will do so, and the rule is meaningless.

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[13] At the time that they made that decision, Petitioners and their lawyers had been made fully aware of the requirements for pleading a RICO case by the standing order in *Enterprise*.

[14] "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of [the issue presented] can await a day when the issue is posed less abstractly." *Monrosa*, 359 U.S. at 184.

Petitioners sued Respondents for one reason only: their status as officers or former officers of The Western Company of North America. The laws punish conduct, not status. Merely being an employee, even an officer, of a company that allegedly provided imperfect cement to certain well operators does not make one a RICO violator. That is the problem with Petitioners' case; that is why their pleading was dismissed; that is why the dismissal was affirmed.

CONCLUSION

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

Catharina J.H.D. Haynes
Attorney of Record
Rod Phelan
Baker & Botts
800 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201-2916
(214) 953-6500

Counsel for Respondents

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ADDENDUM

Excerpts from Plaintiffs' Original Petition filed August 30, 1990 in Texas state court and removed to the United States District Court for the Southern District of Texas.

Examples of Paragraphs Directed at Western

11. For many years, The Western Company of North America, has been a well respected company providing a wide range of well services to the oil and gas industry throughout the United States and overseas. Among the services provided is the cementing of casing [surface, intermediate and production casing], a process in which a cement slurry of a very specifically designed characteristic is pumped down the casing, out of the bottom and up between the casing and the well bore to bond the casing to the surronding [sic] rocks, formations and soils and to isolate zones and formations from one another; along with remedial or stimulation work on wells such as acidizing, fracturing, squeezing and setting plugs when a well is plugged and abandoned.

55. The Western Company of North America, the 100% owner of Western Petroleum Services, Incorporated, by its agent according to PENAL CODE SECTION 7.21 admitted and confessed, "An adulterated commodity to-wit: Cement ordered . . . for use in a well . . . , said cement not being of the type ordered having been blended with cement returned from other jobs and being of an unknown type due to its continual blending with various types and amounts of returned materials." The quote is from a *"Stipulation of Evidence"* filed in the County Court at Law, Victoria County, Texas, in Cause No. 1-47,401 styled the State of Texas vs. Western Company of North America wherein The Western Company of North America entered a plea of guilty to intentionally and knowingly committing a deceptive business practice by selling an adulterated commodity on nine different occasions. A copy of the record from the court is attached as Exhibit *"G"*. Western was fined $5,000.00 plus $25,000.00 to be paid to the Attorney's [sic] General's office. Additionally, Western identified twelve other wells in which it admitted

adulterated cement had been used. To believe this practice was limited to those twenty-one wells in light of the foregoing documentation would be ludicrous.

56. By the way, the exhibits being used as examples to this pleading are copies of the actual documents on one of the wells that was the subject of the criminal investigation referred to. The drilling contractor was Frio Drilling. The well was the Staples No. 1 in Victoria County cemented on or about March 11, 1985.

65. The total harm done by this nationwide scheme of Western, Incorproated [sic] to this Plaintiff and other consumers, the environment and the public, cannot be fully assessed. Western has contracted to do work on many wells with other operators and drilling contractors. The Plaintiff now has reason to believe that all were victims of this intentional and wanton misconduct on the part of Western.

Examples of the Irrelevant Detail that Permeates the Pleading

17. The operator is always looking for a specific geological formation that he believes will contain minerals or that has heretofore proven to contain oil or gas in the past. Contrary to popular belief, one does not just start drilling and keep going until you hit or quit. The particular formation or formations that the operator has targeted for any particular well are well known to him and he generally knows at approximately what depth they will be encountered. So an exploration program normally calls for the drilling to a certain Total Depth in order to test certain known geological formations [also known as pay zones].

18. If the sought after pay zones are located, then they will be evaluated by the operator to determine if they contain commercial quantities of producible oil or gas. This is done by running many various test [sic] offered by wireline companies including electric logs, neutron density logs, combo logs, formation tests, core analysis and so on. Sometimes many of

the tests can be avoided, as in the case of a *"gusher"* or other objective evidence presented during drilling. In any event, once the Total Depth has been reached and evaluations made then a decision must be made to plug and abandon or complete the well. If the decision is to plug and abandon, then, cement plugs are set in the *"well bore"* and surface casing at predetermined depths and the surface casing is cut off below ground level, capped, and covered up and the location and well are abandoned by the operator and no further monies are spent on this well. Of the total cost of a completed oil and gas well only about 60% is incurred in the drilling while the other 40% is spent in completing it so that it may be produced.

19. In order to complete an oil or gas well it is necessary to stabalize [sic] the well bore from the surface to the bottom of the formations to be produced. This is accomplished by placing casing inside the well bore. The casing is pipe somewhat smaller than the well bore which is screwed together and lowered into the well bore from the drilling rig. This pipe is most often called longstring or production string. Once the hole has thus been cased, then the areas surrounding the pay zones from which production will be attempted must be cemented. This is an extremely crucial portion of completing the well.

20. The geological formations through which the *"well bore"* has been drilled must now be isolated from each other. The casing will prevent the well bore from collapsing but it will not prevent the different zones from communicating with each other. That is water, brine, oil, gas, and other substances may migrate vertically up and down around the casing in the space between the outside edge of the well bore and the casing. This space is called the annulus or annular space. In order to produce the well a hole will have to be shot through the casing adjacent to the oil or gas bearing formation so the oil or gas can be brought into the casing and to the surface. If this was done before cementing or if the cement is not correct or the cementing job is not correctly done, then there is no

predicting what if anything will come through the perforations in the casing.

21. The purpose then of cementing is to fill the space surrounding the casing with a proper cement mix and bond the casing to the surrounding rocks, soils, formations and earth. This in turn will isolate the formations from each other, stabalize [sic] the formations, and prevent the migration of fluids from one formation to another. If this is properly done, then a hole may be shot through the casing, cement and into the formation desired to be produced and whatever fluids or gases are within that particular formation may enter the casing without being mixed with gases or fluids from other formations. Generally the oil and gas bearing zones are adjacent to brines and if these brines [salt waters] are not isolated from the pay zones it will result in the well producing salt water with the oil or gas when it should not or salt water instead of oil or gas.

Paragraphs Petitioners Contended Provide "Specific Factual Allegations" and Details of Mailings "In Connection With the Scheme"

26. On or about September 7, 1985, T & T Production began the drilling of a well known as the Smith Well No. 2 in Brazos County, Texas. The well was permitted as a development well because the lease on which it was to be drilled was surrounded with producing oil and gas wells and is part of a recognized oil field. The surrounding oil and gas wells were producing mainly from the Georgetown formation. The Gorgetown [sic] is a geological formation that was known to bear oil and gas in that area. The Georgetown formation is located at the approximate depth of 8166 feet in that area. So, for this particular well the exploration program was to drill a well to a depth just sufficient to penetrate the Georgetown formation which was expected to be found at approximately 8166′ and to produce it.

29. On or about September 20th 1985, T & T contacted Western and asked if they wanted to bid on the job. They expressed a desire to do so and asked for specific information about the job so that they could determine what materials and services would be required on the job. Based on the information received about the well, such as size of the well bore, depth, casing size and any other information requested by the Defendant or offered by the Plaintiff about the well, Western then used its expertise to determine how much cement and other additives would be needed to formulate a blend of cement slurry that would meet the requirement of that particular well and also fulfill the requirements of the TEXAS DEPARTMENT OF WATER RESOURCES and the TEXAS RAILROAD COMMISSION. This information along with the price for the materials and services to do the job would be reduced to writing and would normally be referred to as the *"proposal"*. A sample of one such type of proposal is attached as Exhibit "*A*".

38. As noted by Exhibit *"D"* Western substituted [for the *"Pacesetter Lite"*] *"50/50 Poz"* a formula consisting of only 50 percent API cement with 50 percent Poz, and approximately 4 percent gel and 3 percent salt. This substituted mix was sufficiently close in appearance to fake out the customers, and the fact that *"50/50 Poz"* was being substituted for the real *"Pacesetter Lite"* was never disclosed to Western's customers. Western charged for the real *"Pacesetter Lite"* while shorting the customers 23 percent [almost one-fourth] of the Class A API cement the customers should have been receiving. Another way of stating the foregoing is that when Western claimed to have delivered and sold *"Pacesetter Lite"* Western simply substituted 23 percent fly ash for 23 percent of the cement that should have been in the product. Note also that on the W-15's sent to the TEXAS RAILROAD COMMISSION Western referred to the cement delivered as *"Pacesetter Lite"* which as previously represented would be a false statement.

41. Western prepared a recommendation and gave it to T & T verbally and then later delivered or mailed one to T & T. T & T accepted the recommendation verbably [sic] and Western agreed to do the job as per the recommendation.

60. Exhibits *"H"*, *"I"* and *"J"* are the *"Field Receipts"* and the *"Cement Casing Report"* and the *"Job Report"* respectively. The *"Field Report"* is given to the customer at the job site and it purports that all of the ingredients determined to be needed and promised by Western were in fact delivered. Exhibits *"I"* and *"J"* in their present form are nothing but self serving reports saying that everything went as it should have. Exhibits *"K"* and *"L"* [attached along with *"H"*, *"I"* and *"J"*] are known as Form W-15's, *"Cementing Reports"*. This report is provided by the TEXAS RAILROAD COMMISSION and is required to be filled out and submitted to the TEXAS RAILROAD COMMISSION on each well any time any cementing is done. Exhibit *"K"* is a copy of one which is normally filled in by the cementer is his own hand and given to a secretary to type and mail to the TEXAS RAILROAD COMMISSION. Exhibit *"L"* is a copy of a typed one and it shows, by handwritten notation at the top, that the original was mailed 3-12-85 to the Operator, who would then forward it to the TEXAS RAILROAD COMMISSION. The original should have been signed by the cementer [called a service supervisor at Western]. When the cementer signs it, he certifies certain things as set out above his signature and which are quoted here: *"I declare under penalties prescribed in Sec. 91.143 Texas Natural Resources Code, that I am authorized to make this certification, that the cementing of casing/or the placing of cement plugs in this well as shown in the report was performed by me or under my supervision, and that the cementing data and facts presented on both sides of this form are true, correct, and complete, to the best of my knowledge. This certification covers cementing data only."* Section 91.143 of the TEXAS NATURAL RESOURCES CODE provides for felony punishment by imprisonment in the State Penitentiary for not less than two years, but no more than five years

or by a fine of not more than $1,000.00 or by both if a person falsely, knowingly, signs a false report or aids or connives a false execution of a W-15.

Petitioners' "Mail Fraud" Allegations

80. This claim, which is asserted against the Defendants who are persons as defined in 19 U.S.C. Section 1961(3), arises under the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ["RICO"], 18 U.S.C. Section 1961-1968. This court has jurisdiction under 18 U.S.C. Section 1964(c) and 28 U.S.C. 1332. The conduct herein complained of involves racketeering activity as defiend [sic] in 18 U.S.C. Section 1961(1)(B), specifically mail and wire fraud in connection with the fraudulent affairs of the corporate Defendants. Additionally, Defendants have attempted to obstruct justice and criminal investigation by concealing information, altering computer programs and attempting to silence witnesses.

82. The Defendants, in conjunction with others unnamed as Defendants herein, have engaged in a pattern of racketeering activity as defined in 18 U.S.C. Section 1961(5) in that Defendants engaged in, directly or indirectly, at least two acts of racketeering activity, as defined in 18 U.S.C. Section 1961(1); one such act occurred after October 15, 1970, and the last of which occurred within ten years after the commission of a prior act of racketeering activity, including, without limitation, the following:

> a. Repeated use of the United States Mail and other means or instrumentalities of interstate communication and commerce for the purposes of the offer and sale of intentionally and fraudulently shorted quantities of cement products to the Plaintiff and others and communicated information containing untrue statements and false billing and delivery information by means of such interstate wire and mail facilities.

b. These repeated uses of instrumentalities of interstate wire communication and commerce were acts which are indictable under 18 U.S.C. Section 1343, in that they unlawfully, willfully and knowingly used wire and telephonic communications to execute schemes and artifices devised or intended to defraud the Plaintiff and to obtain money and property from them by means of false and fraudulent pretenses, representations and promises.

c. The above acts committed were also in violation of 18 U.S.C. Section 1341 in that they unlawfully, willfully and knowingly placed into the mail, to be sent or delivered by the postal service, materials used in the execution of, and in connection with, the scheme and artifices devised and intended to defraud the Plaintiff and by means of false and fraudulent pretenses, representations and promises.